

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA

Plaintiff,

SIERRA CLUB,

Intervenor-Plaintiff,

v.

DTE ENERGY COMPANY and
DETROIT EDISON COMPANY,

Defendants.

No. 10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven
Whalen

Jeffrey Bossert Clark
Michael B. Buschbacher
Environment & Natural Resources Div.
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530
202-305-2075
michael.buschbacher@usdoj.gov
Counsel for United States

Michael J. Solo
DTE Energy Company
One Energy Plaza
Detroit, MI 48226
313-235-9512
solom@dteenergy.com
Counsel for Defendants

F. William Brownell
Hunton Andrews Kurth LLP
2200 Pennsylvania Ave NW
Washington, DC 20037
202-955-1500

C. Boyden Gray*
Jonathan Berry*
James R. Conde*
T. Elliot Gaiser
Boyden Gray & Associates
801 17th Street NW, Suite 350
Washington, DC 20006
202-955-0620
gaiser@boydengrayassociates.com
Counsel for Proposed Amici Curiae

**Not admitted to this Court.*

Andrew F. Fink III (P74182)
FINK & FINK PLLC
320 N. Main St., Ste. 300
Ann Arbor, MI 48104
734-994-1077
Andrew.fink@finkandfink.com
Counsel for Proposed Amici Curiae

bbrownell@huntonak.com
Counsel for Defendants

Holly D. Bressett
Susan L. Williams
Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94105
415-977-5629
holly.bressett@sierraclub.org
laurie.williams@sierraclub.org
Counsel for Intervenor-Plaintiff

Shannon W. Fisk
Earthjustice
1617 John F. Kennedy Blvd.
Suite 1675
Philadelphia, PA 19103
215-717-4520
sfisk@earthjustice.org
Counsel for Intervenor-Plaintiff

**MOTION OF RICHARD EPSTEIN AND JEREMY RABKIN FOR LEAVE TO
FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF UNITED
STATES OF AMERICA**

Proposed *amici curiae* Richard Epstein and Jeremy Rabkin (“*amici*”) by counsel, pursuant to Fed. R. Civ. P. 7 and LR 7.1, respectfully move this Court for leave to file the proposed *amici curiae* brief attached to this motion as Exhibit A in support of Plaintiff United States of America.

1. Professor Richard Epstein is the Laurence A. Tisch Professor of Law at NYU School of Law, the Peter and Kirsten Bedford Senior Lecturer at the Hoover Institution, and the James Parker Hall Distinguished Service Professor Emeritus and Senior Lecturer at the University of Chicago. Jeremy A. Rabkin is a law professor at George Mason University’s Antonin Scalia Law School. *Amici* are recognized constitutional law experts with no pecuniary interest in the outcome of this case. The Constitution’s structure and ideals are at the core of their academic focus. *Amici* share not only a general interest in the important principles of liberty protected by the text and structure of the Constitution, but a particular interest as

legal scholars in the orderly judicial application of constitutional principles in cases that raise significant questions about the structure of the federal government.

2. This suit raises just such significant constitutional questions. Intervenor-Plaintiff Sierra Club seeks judicial entry of an agreement between the Sierra Club and DTE, or judicial notice of that agreement. Plaintiff United States of America argues this relief may transgress the Vesting and Take Care Clauses of the U.S. Constitution. *See* U.S. Const. Art. II, § 1, cl. 1.

3. *Amici* respectfully submit their brief is thus “relevant to the disposition of the case,” Fed. R. App. P. 29(b), and “addresses issues . . . which no other party has raised before this Court.” *In re Dow Corning Corp.*, 255 B.R. 445, 465 (E.D. Mich. 2000), *aff’d and remanded*, 280 F.3d 648 (6th Cir. 2002) (granting motion for leave to file *amicus curiae* brief). *Amici*’s brief seeks to offer legal, theoretical, and historical arguments relevant to the resolution of these important constitutional issues. *Amici* seek to go beyond the arguments presented by the parties to show that citizen suits allow private parties to enforce public rights without constitutionally required executive supervision, and thus infringe on core executive powers reserved to the President and his properly appointed and supervised subordinates. Thus, the proposed brief will not “duplicate the arguments made in the litigants’ briefs.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

4. Courts regularly exercise discretion to grant leave to file *amici curiae* briefs. “Generally, courts have exercised great liberality in permitting an *amicus*

curiae to file a brief in a pending case.” *United States v. State of La.*, 751 F. Supp. 608, 620 (E.D. La. 1990). “District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved.” *Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003); *see, e.g., Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1454 n.11 (6th Cir. 1988) (noting that the Court granted a motion to file a post-argument *amicus* brief, in part “[b]ecause of the complexity of this case” and because *amicus* “raised some arguments which have not been raised by the principal parties to this action.”).

5. This *amici curiae* brief is timely because there are no rules “prescribing” the time to file an *amicus* brief in district court. *See Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J.*, No. 11-CV-6746 (RJH), 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011) (quotation, alteration, and citation omitted). To the extent the Court applies Federal Rule of Appellate Procedure 29(a)(6) here, *amici* seek leave to file out of time. This brief shares its core argument with arguments previously discussed by the United States, so Sierra Club had notice. Moreover, this brief is filed a week in advance of Sierra Club’s reply, giving Sierra Club time to address *amici*’s arguments. Because this brief will aid the Court without prejudicing Sierra Club, the Court should grant leave to file.

6. Under E.D. Mich. LR 7.1(d)(3)(A), “[t]he text of a brief supporting a motion or response, including footnotes and signatures, may not exceed 25 pages.” Thus, the *amici* brief is 12-1/2 pages in length in keeping with the practice (which may or

may not bind *amici* in this court, *cf.* Fed. R. App. P. 29(a)(5)) that *amicus* briefs not exceed half the length of party briefs.

7. Counsel to *amici* certify that there was a conference under LR 7.1(a)(2)(A) between attorneys via email. Plaintiff United States stated it supports the professors' motion. DTE stated that it takes no position on *amici's* motion. Counsel for Intervenor-Plaintiffs Sierra Club stated they are willing to not oppose *amici's* motion for leave conditioned on the filing deadline for Sierra Club's reply brief (which is currently due Monday, August 3) being extended to 10 days after the *amicus* brief is filed, and the page limit for Sierra Club's reply being enlarged by 7 pages (to 19 pages from the current limit of 12 pages).

WHEREFORE, for the foregoing reasons, *amici* respectfully request leave of this Court to file an *amici curiae* brief that is attached as Exhibit A.

Respectfully submitted

Andrew F. Fink III (P74182)
FINK & FINK PLLC
320 N. Main St., Ste. 300
Ann Arbor, MI 48104
734-994-1077
Andrew.fink@finkandfink.com
Counsel for Proposed Amici Curiae

s/T. Elliot Gaiser
C. Boyden Gray*
Jonathan Berry*
James R. Conde*
T. Elliot Gaiser
Counsel of Record
Boyden Gray & Associates
801 17th Street NW, Suite 350
Washington, DC 20006
202-955-0620
gaiser@boydengrayassociates.com
Counsel for Proposed Amici Curiae

**Not admitted to this Court.*

**BRIEF IN SUPPORT OF MOTION OF RICHARD EPSTEIN AND JEREMY
RABKIN FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF
PLAINTIFF UNITED STATES OF AMERICA**

In support of their Motion, proposed *amici* rely on Fed. R. Civ. P. 7, LR 7.1, *Flagg v Detroit*, 252 F.R.D. 346, 360 n. 28 & 367 (E.D. Mich. 2008), and *Freed v. Thomas*, No. 17-CV-13519, 2018 WL 3848155, at *3 (E.D. Mich. Aug. 9, 2018).

Respectfully submitted

Andrew F. Fink III (P74182)
FINK & FINK PLLC
320 N. Main St., Ste. 300
Ann Arbor, MI 48104
734-994-1077
Andrew.fink@finkandfink.com
Counsel for Proposed Amici Curiae

s/T. Elliot Gaiser
C. Boyden Gray*
Jonathan Berry*
James R. Conde*
T. Elliot Gaiser
Counsel of Record
Boyden Gray & Associates
801 17th Street NW, Suite 350
Washington, DC 20006
202-955-0620
gaiser@boydengrayassociates.com
Counsel for Proposed Amici Curiae

**Not admitted to this Court.*

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2020, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

s/T. Elliot Gaiser

T. Elliot Gaiser

D.C. Bar ID: 198293

Boyden Gray & Associates

801 17th Street NW, Suite 350

Washington, DC 20006

202-955-0620

gaiser@boydengrayassociates.com